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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-737

STATE OF MICHIGAN,
Petitioner,

v.

EDWARD ALLEN TRUDEAU,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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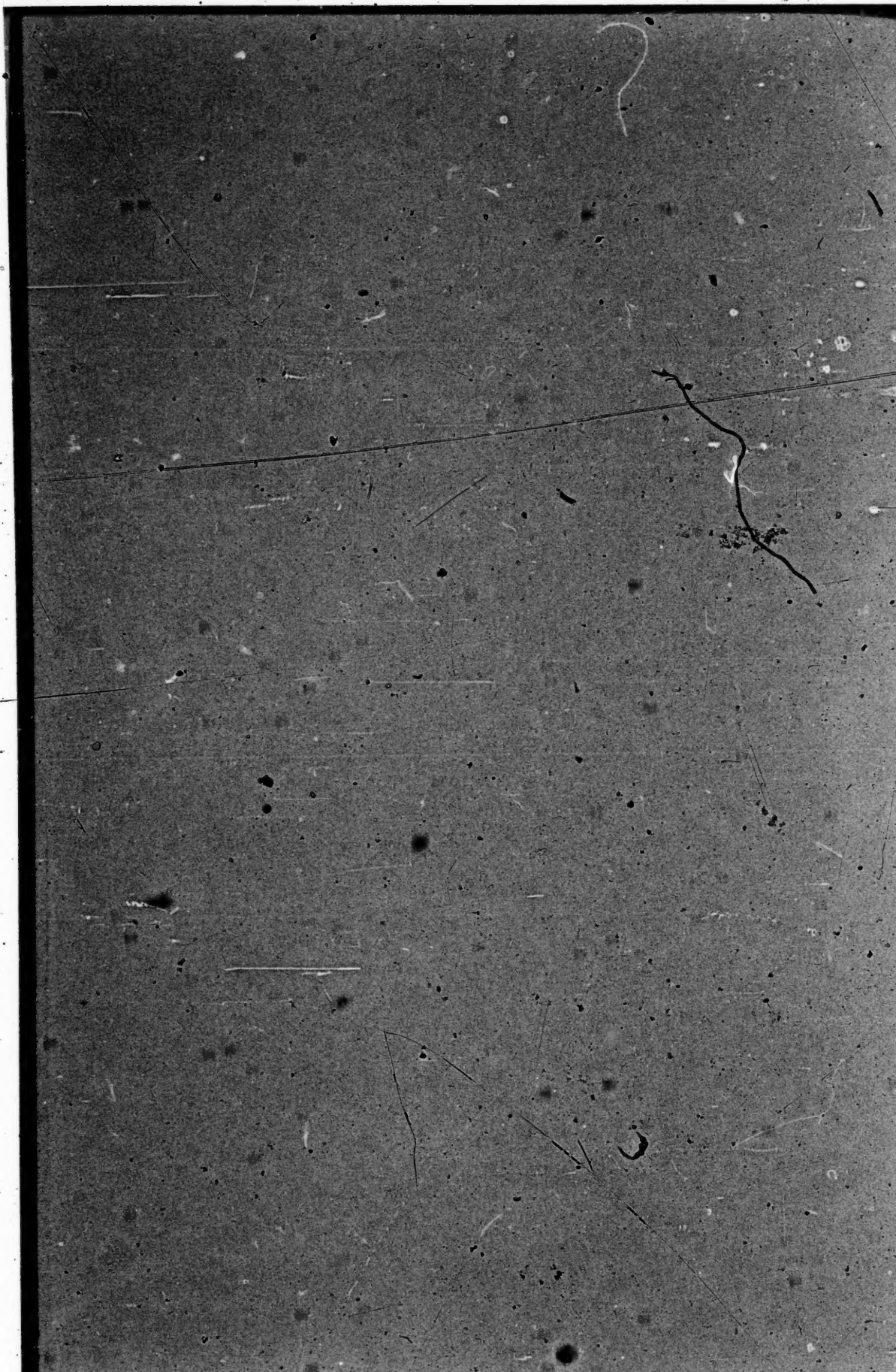

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STATE OF MICHIGAN,
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EDWARD ALLEN TRUDEAU,
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PETITION FOR WRIT OF CERTIORARI

Now comes Thomas G. Plunkett, Prosecuting Attorney in and for the County of Oakland, State of Michigan, by Dennis Donohue, Chief Appellate Counsel, respectfully submitting this Petition for Writ of Certiorari and says as follows:

OPINION

The opinion of the Supreme Court of the State of Michigan is reported at 385 Mich 276; 187 NW 2d 890 (1971). The opinion of the Michigan Court of Appeals is reported at 22 Mich App 246; 177 NW 2d 171 (1970). Copies of the opinion of the Michigan Supreme Court and the opinion of the Michigan Court of Appeals are included in the Appendix to this, Petitioner's Petition for Writ of Certiorari (1a to 25a).

JURISDICTION

The grounds on which the jurisdiction of this Honorable Court is invoked by your Petitioner include the following:

A) On July 7, 1971, the Supreme Court of the State of Michigan reversed the conviction of Edward Allen Trudeau in the case of *People vs. Trudeau,* 385 Mich 276; 187 NW 2d 890 (1971). B) In an order certified on September 2, 1971, the Supreme Court of the State of Michigan denied Petitioner's Application for Rehearing. A copy of that order is included in the Appendix to this Petitioner's Petition for Writ of Certiorari and incorporated by reference herein.

C) The statutory provision which confers jurisdiction on this Court to review the judgment of the Supreme Court of the State of Michigan is contained in 28 U.S. Code Annot. §1257(3), which reads as follows:

> By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in

question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

QUESTION PRESENTED FOR REVIEW

The question presented for review is as follows:

WHETHER AN ACCUSED ALREADY IN LAWFUL CUSTODY HAS A RIGHT TO REFUSE TO SURRENDER AND/OR DISPLAY HIS SHOES UNLESS THE POLICE AUTHORITIES FIRST OBTAIN A SEARCH WARRANT.

CONSTITUTIONAL PROVISIONS

The constitutional provisions which the above entitled Petition involves are as follows:

Constitution of the United States, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF FACTS

(References are to pages of the trial transcript unless otherwise indicated)

Defendant-Appellee, Edward Allen Trudeau, was arrested on November 19, 1967, in the United States Post Office Building on Dearborn Street, Detroit, Michigan. He was charged with attempt to injure or destroy a vault, and breaking and entering a building with intent to commit larceny. He was arraigned on this charge and preliminary examination was set for November 27, 1967 (Preliminary Examination, January 25, 1968, pp. 141, 150, 151).

On November 6, 1967, during an attempted burglary from a vault at the Shaarey Zedek Synagogue in Southfield, Michigan, the nightwatchman was killed (transcript, pp. 63-68). A heel print was left at the scene of the crime (transcript, pp. 128-130). Sergeant Fasbinder of the Southfield Police Department was assigned to the Shaarey Zedek case.

Because of the similarity between the United States Post Office and Shaarey Zedek break-ins, Sergeant Fasbinder decided to view the shoes of Trudeau, Preliminary Examination, Janu. 26, 1968, pp. 3-4).

On November 27, 1971, Sergeant Fasbinder went to Detroit Recorder's Court where Trudeau's preliminary examination was being held (transcript, p. 189). Unable to post bond for the United States Post Office charge, Trudeau was under pre-trial custody. Fasbinder approached Trudeau while in the prisoner's detention area and asked to view his shoes. Trudeau complied (transcript, pp. 192-193). Sergeant Fasbinder did not advise Trudeau of his constitutional rights. His appointed attorney was not present.

Later the same day, while Trudeau was in custody at the Wayne County Jail, his shoes were taken from him for comparison purposes (transcript, pp. 193-194). Trudeau had no attorney present, nor was he advised of his constitutional rights.

The heel print of Trudeau's shoes matched the imprint of a heel found on the floor of the Shaarey Zedek Synagogue as discovered on the morning the victim's body was found.

At Trudeau's trial on the Shaarey Zedek charges, the shoes, the imprint and their comparison by an expert, were introduced into evidence over defendant's objection (transcript, pp. 194-206; 215-218). Also a witness Raymond Smiegel testified that Trudeau had been involved in the Shaarey Zedek breaking and that the watchman had been killed (transcript, pp. 298-301).

Trudeau was convicted of second degree murder and breaking and entering in connection with the Shaarey Zedek crime.

The Michigan Court of Appeals affirmed the conviction 22 Mich App 246; 177 NW 2d 171 (1970). The Supreme Court of the State of Michigan reversed, 385 Mich 276; 187 NW 2d 890 (1971).

REVIEW OF ISSUE IN STATE COURTS

Counsel for Defendant Trudeau first objected to the introduction into evidence of the shoes at the preliminary examination, arguing that the Defendant was not advised of his constitutional rights and that the police had no search warrant for the shoes (preliminary examination, Jan. 26, 1968, pp. 35-50).

The examining magistrate, without opinion, overruled Defendant's objections and received the shoes in evidence (preliminary examination, Jan. 26, 1968, p. 51).

Prior to trial, Defendant Trudeau filed a motion to dismiss, alleging that the shoes were seized as the result of an illegal search, conducted without a search warrant. Copies of Defendant's motion to suppress evidence are included in the Appendix to this, Petitioner's Petition for Write of Certiorari.

No order appears in the record, denying Defendant's pretrial motion to suppress. However, at the trial of the cause, Defendant objected to the Prosecutor's attempts to introduce the shoes into evidence. At this point, Defendant contended that his rights to have counsel present and his right to be free from self-incrimination would be violated by permitting the People to introduce the shoes into evidence. Defendant also argued that the police should have obtained a search warrant prior to seizing the shoes. The trial court orally denied Defendant's objections and, without further opinion, allowed the shoes to be admitted into evidence (trial transcript, pp. 192-206).

The Court of Appeals for the State of Michigan affirmed Defendant's conviction, 22 Mich App 246; 177 NW 2d 171 (1970).

The Supreme Court for the State of Michigan reversed, holding that an accused does not lose his constitutional right to be free from unreasonable search and seizure while he is in custody:

> The United States Supreme Court has declared that an imprisoned felon does not lose his constitutional right against self-incrimination as to an entirely separate offense. *Mathis v. United States,*

391 US 1, 88 S Ct 1503, 20 L ed 2d 381 (1968). The right against unreasonable search and seizure is of equal stature with the privilege against self-incrimination.

Defendant did not lose his civil rights or liberties while he was in police custody awaiting trial on another charge. This holding is not to be construed as in any way affecting essential steps which must be taken by the police in processing a prisoner as outlined in *United States v. Wade*, 388 US 217, 87 S Ct 1926, 18 L ed 2d 1149 (1967), and to assure the protection of the police and of other prisoners. The Court of Appeals is reversed. The conviction is set aside and the case is remanded to the trial court for a new trial. *People v. Trudeau*, 385 Mich 276, 281; 187 NW 2d 890, (1971).

REASONS FOR GRANTING THE WRIT

The instant petition treats a federal constitutional question not heretofore determined by this Honorable Court.

The question presented "Whether an accused already in lawful custody has a right to refuse to surrender and/or display his shoes unless police authorities first obtain a search warrant concerns itself with the extent of constitutional protections enjoyed by one who is in lawful custody.

Current events in Attica, New York and New York City give this question added importance. The specter of jail inmates demanding search warrants before surrendering to fingerprinting or the giving up of their clothing or hair samples is not pleasant to contemplate.

Petitioner starts with the assumpton that an accused has no right not to be compelled to exhibit his person, his

fingerprints, his clothing, his hair samples, etc., pursuant to the Fifth Amendment to the constitution of the United States. *United States v. Wade,* 388 US 218 (1967); *Gilbert v. California,* 388 US 263 (1967).

Petitioner continues with the assumpton that the taking of clothing from an accused in lawful custody is not a "critical stage" of the proceedings requiring the presence of counsel. *United States v. Wade, supra.*

It also seems clear that this Honorable Court has clearly indicated that the principle object of the Fourth Amendment is the protection of privacy rather than property. *Warden v. Hayden,* 387 US 294 (1967).

If it is true that the Fourth Amendment protects people, not places, *Katz v. United States,* 389 US 347, 351 (1967) it is also true that:

> The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a two-fold requirement, first that a person has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable". *Katz v. United States,* 389 US 347, 361 (1967). (Justice Harlan, concurring).

Although Justice Stewart has criticized the incantation of catch phrases such as "constitutionally protected area", he has unequivocally declared that a jail house is not a place where any right to be free from search and seizure exists:

> But to say that a public jail is the equivalent of a man's "house" or that it is a place where he can claim constitutional immunity from search or seiz-

> ure of his person, his papers, or his effects, is at best a novel argument. To be sure, the Court has been far from niggardly in construing the physical scope of Fourth Amendment protection.
>
> A business office is a protected area, and so may be a store. A hotel room, in the eyes of the Fourth Amendment, may become a person's "house," and so, of course, may an apartment. An automobile may not be unreasonably searched. Neither may an occupied taxicab. Yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day. *Lanza v. New York*, 370 US 139, 143 (1962).

Petitioner submits that the error of the Supreme Court of the State of Michigan can be encapsulated in this sentence:

> The United States Supreme Court has declared that an imprisoned felon does not lose his constitutional right against self-incrimination as to an entirely separate offense. *Mathis v. United States*, 391 U.S. 1, 88 S Ct 1503, 20 L ed 2d 381 (1968).
>
> The right against unreasonable search and seizure is of equal stature with the privilege against self-incrimination. *People v. Trudeau*, 385 Mich 276, 281; 187 NW 2d 890, 892 (1971).

Obviously the right against unreasonable search and seizure is not of equal stature with the privilege against self-incrimination.

The right against self-incrimination is absolute and unqualified. It never dissolves upon an accused being lawfully arrested nor can a magistrate issue a warrant au-

thorizing the extracting of a confession from an accused against his will.

The right to be free from unreasonable search and seizure is of considerably less extent.

Upon lawful arrest, a search, without probable cause may be conducted of the immediate surroundings of the accused or even to those areas where he might leap to destroy evidence or procure a weapon. *Chimel v. California* 395 US 752 (1969).

While Petitioner does not dispute the right of an in-custody accused to legitimately expect that his house or his car will not be unreasonably searched without the authority of a warrant, Petitioner does most urgently contend that an in-custody accused should have no reasonable expectation as to his person other than the expectation of being under constant surveillance, subject to thorough search at the discretion of his jailers. See the New York State Commissios of Correction, Regulations for Management of County Jails, quoted in *Lanza v. New York, supra* at 143, footnote 14.

The question still remains, as put by Justice Harlan, whether the asserted expectation of privacy is one that society is prepared to recognize as reasonable. *Katz v. United States, supra.*

Petitioner submits that this Court's previous decisions answer Mr. Trudeau's expectations in the negative.

Clearly the shoes themselves, along with Mr. Trudeau's other clothing enjoy no privilege. *United States v. Wade, supra; Gilbert v. California, supra.*

Just as clear is the fact that while in lawful custody Trudeau had no right of privacy which protected him from police surveillance or search even without a warrant. *Lanza v. New York, supra.*

RELIEF

Wherefore, Petitioner respectfully requests this Honorable Court to grant Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

THOMAS G. PLUNKETT
Prosecuting Attorney
Oakland County
State of Michigan
By; Dennis Donohue
Chief Appellate Counsel

APPENDIX

OPINION OF THE MICHIGAN SUPREME COURT

People of the State of Michigan,
Plaintiff-Appellee,
v.
Edward Allen Trudeau, Defendant-Appellant.

No. 33.

Supreme Court of Michigan.

July 7, 1971.

Defendant was convicted in the Circuit Court of Oakland County, Frederick C. Ziem, J., of second-degree murder, and he appealed. The Court of Appeals, McGregor, J., 22 Mich.App. 246, 177 N.W.2d 171, affirmed, and leave to appeal was granted. The Supreme Court held that seizure, while defendant was in custody on another charge, of defendant's shoe which by comparison with heel print left at scene of murder, connected defendant with the murder was without probable cause and in violation of defendant's constitutional rights where officer was acting on mere suspicion because of similariy between the murder and the offense for which defendant was in custody and where the vital link between the shoe and the heel print was not established until expert had conducted week-long examination, and the seizure could not be justified under the plain or open view doctrine.

Reversed and remanded.

Brennan, J., who would affirm, filed opinion, in which Black, J., joined.

1. Searches and Seizures 3.3(4), 7(12)

Seizure, while defendant was in custody on another charge, of defendant's shoe which, by comparison with heel print left at scene of murder, connected defendant with the murder was without probable cause and in violation of defendant's constitutional rights where officer was acting on mere suspicion because of similarity between the murder and the offense for which defendant was in custody and where the vital link between the shoe and the heel print was not established until expert had conducted week-long examination, and the seizure could not be justified under the plain or open view doctrine. U.S.C.A. Const. Amend. 4; M.C.L.A.Const.1963, art. 1, § 11.

2. Civil Rights 1

Defendant did not lose his civil rights or liberties while he was in police custody awaiting trial.

Thomas G. Plunkett, Pros. Atty., Oakland County by Dennis Donohue, Chief Appellate Counsel, Pontiac, for plaintiff-appellee.

State Appellate Defender Office by Jane Burgess, Detroit, Mich., for defendant-appellant.

Before the Entire Bench.

Per Curiam.

Defendant was arrested on November 19, 1967, in the U. S. Post Office Building on Dearborn Street, Detroit. He was charged with an attempt to injure or destroy a vault, and breaking and entering a building with intent to commit larceny. He was arraigned on November 20, 1967, without an attorney. At the arraignment, counsel was appointed

for Trudeau and his co-defendant. The preliminary examination was set for November 27.

On November 6, 1967, during an attempted burglary from a vault at the Shaarey Zedek Synagogue in Southfield, Michigan, the night watchman was killed by blows to his head from a crow bar. Sergeant Fasbinder of the Southfield police was assigned to that case. One of the few leads available was a heel print left at the scene.

On November 27, Sergeant Fasbinder went to Recorder's Court, where Trudeau's preliminary examination on the U. S. Post Office case was to be held, apparently to view the shoes of Trudeau and his co-defendant because of the similarity between the Post Office and the Shaarey Zedek jobs. Trudeau's appointed counsel was unable to appear at the November 27 preliminary examination. Detective Randolph of the Detroit Police Department and Sergeant Fasbinder took defendant from the bull pen at the court house and requested that he lift his feet so that Sergeant Fasbinder could observe the heels of his shoes. He did so. Later the same day back at the Wayne County jail, Sergeant Fashbinder, with two or more police officers, requested Trudeau to give him his shoes. Trudeau refused. The police officers took the shoes from him and gave them to Sergeant Fasbinder. Trudeau had no attorney present. He was not advised of his constitutional rights. The officers seizing the shoes had no warrant.

At Trudeau's preliminary examination on the Shaarey Zedek charges, his appointed counsel argued unsuccessfully that all evidence pertaining to the shoes should be suppressed. At trial, the shoe, the imprint, and their comparison by an expert, were introduced in evidence over defendant's objection. Trudeau was convicted of second degree murder and breaking and entering in connection with

the Shaarey Zedek crime. The Court of Appeals affirmed. (22 Mich.App. 246, 177 N.W.2d 171). We granted leave to appeal. (384 Mich. 762).

Defendant argues that his fourth, fifth and sixth amendment rights were violated while he was in custody awaiting trial for another crime. The State argues that the seizure was allowable under the "open view" doctrine, and that there is no fourth, fifth or sixth amendment protection against fingerprinting or obtaining measurements of a defendant in custody.

[1] We are unable to accept the people's contention that the shoes were properly seized under the plain or open view doctrine. There is no showing that when Sergeant Fasbinder went to the jail he was acting on anything other than a mere suspicion. Even after he had viewed the shoes and finally obtained them, the vital link between the shoes and the heel print found at the scene of the crime was not established. The shoes were turned over to an expert who testified as follows:

> "A. * * * These examinations, as I say, started that day and continued for a period of about one week, either full or part time, during that period of time. In the first instance, I examined a partial heel print found on the back of a statement form, People's exhibit two. This examination was made visually and microscopically, utilizing various lighting techniques. A little bit later, the partial heel print was photographed in a number of ways, utilizing various types of lighting techniques. The heels of the shoes, People's exhibit 15, were also examined, visually by myself, and microscopically treated in various ways, and photographed. At least the left heel was photographed, subsequently, by myself. Comparisons were then made

of the photographs obtained, as a result of the initial comparisons and microscopic examination.

"Q. Approximately how long did this examination take you, Lieutenant Myers?

A. As I've stated, it took the better part of one week, was the working hours, the better part of one week."

From the above testimony, it is apparent that Sergeant Fasbinder had no probable cause to believe that the seized shoes were evidence linked to the crime. This was not established until the expert made his week-long examination of them. If Trudeau had not been in custody, the Southfield Police Department would have had to obtain a warrant to search and seize an article of his clothing. Since there was no showing of probable cause for the seizure, what of Trudeau's fourth amendment (U.S. Constitution) and article 1, § 11 (Michigan Constitution) rights to be secure from unreasonable search and seizure?

In People v. Carr (1963), 370 Mich. 251, 121 N.W.2d 449, this Court reversed a conviction based on evidence obtained from a warrantless search of defendant's impounded car while defendant was serving a jail sentence on an unrelated misdemeanor charge. This Court unanimously pointed out in *Carr* that (p. 255, 121 N.W.2d p. 451):

> "It could not be seriously urged that the search and seizure made by the officers without defendant's consent or without a search warrant could not, nor likely would not even have been attempted, had defendant been at liberty and his automobile been parked on his own premises. Defendant was not stripped of his civil rights and his constitutional safeguards merely because he was serving a sentence in the county jail for

> an unrelated misdemeanor. It would be a dangerous rule of law and an invitation to circumvent the constitutional guaranty against unreasonable search and seizure were the citizen convicted of a misdemeanor and in jail, possibly in default of payment of a fine to be stripped of all his civil liberties."

The United States Supreme Court has declared that an imprisoned felon does not lose his constitutional right against self-incrimination as to an entirely separate offense. Mathis v. United States, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed. 2d 381 (1968). The right against unreasonable search and seizure is of equal stature with the privilege against self-incrimination.

[2] Defendant did not lose his civil rights or liberties while he was in police custody awaiting trial on another charge. This holding is not to be construed as in any way affecting essential steps which must be taken by the police in processing a prisoner as outlined in United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and to assure the protection of the police and of other prisoners.

The Court of Appeals is reversed. The conviction is set aside and the case is remanded to the trial court for a new trial.

Brennan, Justice.

If the link to the Shaarey Zedek murder had been a fingerprint instead of a heel print, no question of 4th and 5th Amendment rights would have been raised.

I fail to see the distinction.

I would affirm the conviction.

Black, J., concurs with Brennan, J.

COURT OF APPEALS OPINION

22 Mich.App. 246

People of the State of Michigan,
Plaintiff-Appellee,
v.
Edward Trudeau, Defendant-Appellant.

Docket No. 6785.

Court of Appeals of Michigan,
Div. 2.
Feb. 27, 1970.

Released for Publication June 4, 1970.

Defendant was convicted in the Circuit Court of Oakland County, Frederick C. Ziem, J., of second-degree murder and he appealed. The Court of Appeals, McGregor, J., held that where defendant was lawfully detained on felony arrest for breaking and entering, defendant was suspect in murder investigation and only shoe, which was in open view, was taken from him for comparison with shoe print at murder scene, taking of shoe without warrant did not constitute unreasonable search and seizure.

Affirmed.

1. *Searches and Seizures 7(12)*

Where defendant was lawfully detained on felony arrest for breaking and entering, defendant was suspect in murder investigation and only shoe, which was in open view, was taken from him for comparison with shoe print at murder scene, taking of shoe without warrant did not constitute unreasonable search and seizure, U.S.C.A. Const. Amends. 4, 14.

2. *Searches and Seizures 7(1)*

The Fourth Amendment protects an individual from unreasonable searches and seizures; it protects one's right of personal privacy. U.S.C.A. Const. Amend. 4.

3. *Criminal Law 393(1)*

The Fifth Amendment privilege against self-incrimination, as made applicable to the States by the Fourteenth Amendment, protects an accused from being compelled to testify against himself, or otherwise being compelled to provide the state with evidence of a testimonial or communicative nature. U.S.C.A. Const. Amends. 5, 14.

4. *Criminal Law 393(1)*

The Fifth Amendment privilege against self-incrimination is not a bar against that compulsion which makes a suspect the source of real or physical evidence. U.S.C.A. Const. Amends. 5, 14.

5. *Criminal Law 393(4)*

Defendant's privilege against self-incrimination was not violated when police took defendant's shoe from him while he was incarcerated on breaking and entering charge in order that shoe might be used for comparison with shoe print at scene of murder. U.S.C.A. Const. Amends. 5, 14.

6. *Criminal Law 641.3*

Taking of defendant's shoe for comparison with shoe print at murder scene was not a critical stage of proceedings against defendant and defendant did not have right to counsel at time of taking. U.S.C.A. Const. Amends. 6, 14.

Barry M. Grant, Southfield, for defendant-appellant.

Frank J. Kelley, Atty. Gen., Robert A. Derengoski, Sol. Gen., Thomas G. Plunkett, Jr., Pros. Atty., for plaintiff-appellee.

Before J. H. Gillis, P. J., and McGregor and V. J. Brennan, JJ.

McGregor, Judge.

Defendant Edward Trudeau was convicted of second degree murder, according to statute: C.L. 1948, § 750.317 (Stat.Ann. 1954 Rev. § 28.549). Initially, defendant was arrested in the city of Detroit, for breaking and entering a United States Post Office. During his detention on this charge, investigation of a murder which had occurred at the Shaarey Zedek synagogue was continuing. Part of the evidence acquired in the murder investigation was a heel print of the killer. While the defendant was incarcerated, and apparently without probable cause to arrest him for the synagogue murder, police took his shoes for the purpose of comparing the shoe impression at the scene of the crime and the impression of the defendant's shoes. The report of that study was subsequently admitted into evidence and the defendant was convicted. On appeal, as at trial, defendant alleges error in the admission of this evidence, claiming that it was improperly introduced in contravention of his federal constitutional rights under the 4th, 5th, and 6th amendments.

Defendant advances the argument that his right to be free from unreasonable search and seizure was violated. It is his contention that a warrant was not obtained and that, in any event, probable cause did not exist to arrest him and take his shoes.

Defendant cites People v. Carr (1963), 370 Mich. 251, 121 N.W.2d 449 in support of his argument that the shoe impression was unlawfully obtained and, therefore, improperly admitted into evidence. In *Carr,* the defendant was in jail, serving a 30-day misdemeanor sentence, and was approached by police officers concerning a crime which had occurred in another county. Being unable to learn anything from defendant, the police—without a search warrant and without probable cause to believe that a felony had been committed by Carr—proceeded to make a thorough inspection of his automobile for the purpose of securing evidence which might possibly link the defendant to the out-county crime. Such a search and the resulting evidence were held inadmssible.

In the instant case, defendant was lodged in jail, subsequent to his arrest for the crime of breaking and entering. The police were investigating the synagogue murder and had evidence linking a shoeprint to the murderer. During their investigation, the defendant became a suspect; only his shoes, which were in open view, were taken for purposes of comparing their prints with the shoeprints found at the scene of the murder. The holding in *Carr,* supra, is different in vital respects. Defendant here was under arrest for a felony; no thorough search of his effects took place; only a shoe was taken for comparison, an intrusion which is minimal in light of the circumstances.

Defendant states that the recent case of Davis v. Mississippi (1969), 394 U.S. 721, 89 S. Ct. 1394, 22 L.Ed.2d 676, supports his argument that his fingerprints and shoes were unlawfully taken in violation of the 4th amendment. The fact situation in obtaining the defendant's fingerprints in that case is not analogous to the taking of defendant's shoes here. In *Davis,* the police virtually conducted a dragnet of the local citizenry. At least 24 persons were

fingerprinted and between 40 and 50 youths were interrogated by the police. No attempt was made to employ procedures which might comply with the requirements of the 4th amendment. There was neither a warrant nor probable cause for Davis's arrest. At the time of his detention and when his fingerprints were taken, the police had no intention of charging Davis with the crime and were far from making him the primary focus of their investigation. The Court was clear in emphasizing that the prints were the result of several unlawful detentions which resulted in repeated interrogation and the fingerprinting of the defendant. At one point, and without any probable cause to arrest him, the defendant was housed overnight in jail. In its decision, the Court indicated that fingerprints might be taken from a person in certain defined circumstances although no probable cause may exist to arrest that individual.

[1] We find the inconvenience, harassment, and interrogation present in *Davis* were not present here. This defendant was lawfully detained on the felony arrest, and while so incarcerated, only his shoes were taken for the purpose of correlating the prints thereof with the shoeprints taken at the scene of the synagogue murder.

[2] The 4th amendment protects an individual from *unreasonable* searches and seizures; it protects one's right of personal privacy. To some degree this veil of privacy had already been pierced by defendant's lawful detention. Therefore, considering all the circumstances, we find that defendant's 4th amendment rights have not been violated.

[3-5] The 5th amendment privilege against self-incrimination, as made applicable to the states by the 14th amendment, protects an accused from being compelled to

testify against himself, or otherwise being compelled to provide the state with evidence of a testimonial or communicative nature. Clothing has been consistently regarded as a physical fact, and the 5th amendment is not a bar against that compulsion which makes a suspect the source of real or physical evidence. The distinction between physical and communicative facts is clearly drawn in Schmerber v. California (1966), 384 U.S. 757, 86 S. Ct. 1826, 16 L.Ed.2d 908.

[6] The case of United States v. Wade (1967), 388 U.S. 218, 87 S. Ct. 1926, 18 L.Ed 2d 1149, governs petitioner's assertions that his 6th amendment right to counsel was violated. *Wade* reasoned that the defendant had a right to be advised of and have counsel present at every critical stage of the criminal proceedings. This case also indicates that the time of the taking and analysis of "fingerprints, blood sample, clothing, hair, and the like * * *" is not a critical stage for purposes of requiring counsel. Consistent with that reasoning, we hold that a suspect's right to counsel does not attach when his shoes are taken.

The Michigan case of People v. Davis (1969), 17 Mich. App. 615, 170 N.W.2d 274, in which both U.S. Supreme Court cases, Davis v. Mississippi, supra, and Schermber v. California, supra, were cited as controlling guidelines, supports our decision and we cite it with approval.

Affirmed.

ORDER DENYING REHEARING

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 27th day of August, in the year of our Lord one thousand nine hundred and seventy-one.

Present: the Honorable Thomas M. Kavanagh, Chief Justice, Eugene F. Black, Paul L. Adams, Thomas E. Brennan, Thomas G. Kavanagh, John B. Swainson, G. Mennen Williams, Associate Justices.

On order of the Court, the application for rehearing heretofore filed herein is hereby denied.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 2nd day of September, in the year of our Lord one thousand nine hundred and seventy-one.

Donald F. Winters,
Clerk.

MOTION TO SUPPRESS EVIDENCE AND DISMISS

(State of Michigan—Circuit Court—County of Oakland)

The People of the State of Michigan,
Plaintiff

vs. No. 3387

Edward Trudeau,
Defendant

Now comes the Defendant, by his attorney, Barry M. Grant and moves to suppress evidence and moves for dismissal of the above entitled cause and shows unto this court as follows;

I. *The Search of the Defendant, Edward Trudeau, Was Unlawful*

The Defendant, did not at any time, voluntarily consent to the giving of his shoes as evidence in the said case. Further all police officers testified in the preliminary examination that they did not receive the defendant's permission to obtain said evidence and further, they did not advise the defendant of his constitutional rights in regards to obtaining the said evidence. The obtaining of the evidence violated Michigan Statutes 28.874 and the Michigan State Constitution Article Two, Section 10 and 11 and the 4th and 14th Amendments of the United States Constitution. Article Two, Section 11 in the Michigan Constitution, so far as its provisions are pertinent, reads as follows:

> The person, houses, papers and possessions of every person shall be secured from unreasonable searches

and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, not without probable cause, supported by oath or affirmation."

In the case of *The People vs. Kamhout,* 227 Michigan 172, P 175, the Supreme Court said:

> "An officer cannot lawfully arrest a person without a warrant and search his person for the purpose of ascertaining whether or not he has violated the law. Even if the person in question was in fact violating the law, the offense was not legal contemplation committed in the presence of the officer in such arrest is unauthorized with the facts constituting the offense are incapable of being observed or are not observed by the officer".

On page 177, the Court goes on to say:

> "Therefore, assuming that the arrest was made before the search the arrest was illegal and the seacrh following was illegal and the arrest based thereon without a warrant was illegal".

In this case there was no arrest made by the officer. In the first instance Detective Fasbinder or Detective Randolf asked the Defendant to lift the bottom of his heel so he could observe his heel print. The Defendant then lifted the bottom of his heel and Detective Fasbinder, after observing the heel, went to the Wayne County prosecuting attorney's office, talked with assistant prosecutor, and thereupon returned to the jail without a search warrant, obtained the Defendant's shoes against his permission and took and used the said shoes as evidence in the preminary examination against the Defendant.

II. *The Defendant Was In the Wayne County Jail And In The Recorder's Court Prison Cell Lockup Area When Evidence Was Obtained And The Defendant Did Not Waive His Right To Be Free From Unreasonable Searches and Seizures.*

At no time prior to the search and seizure was the Defendant advised of his constitutional rights to be secure against unreasonable search and seizures: The Defendant was a prisoner and incarcerated in the Recorder's Court Prison lockup cell when the officers first asked him to lift his heel. Approximately 30 minutes to a hour later the police officers returned and removed the shoes from the Defendant against the Defendant's permission. As a matter of fact, it was necessary for three police officers to remove the shoes of the Defendant, at no time did the Defendant give his consent to the said search and seizure. At no time prior to the actual issue of the warrant for the Defendant's arrest (approximately two months later) did any police officers advise the Defendant that he had a right to counsel, that he had a right to refuse to answer any questions and that if he did answer any information that he gave might be used against him, that if he could not afford a counsel, the counsel would be appointed to represent him, nor did any police officer advise the Defendant that he need not submit to a search and seizure of his shoes and that if he did "the fruits of the search" thereof would be used against him.

In the case of the *People vs Zeigler*, 368 Michigan 355, the Supreme Court said that proof of confession is never admissible unless shown to have been, "made voluntarily and the burden of proof is on the people to show that it was." In this case, at no time did the Defendant voluntar-

ily give his shoes to the police department to be used as evidence against him. It is the defense's contention that there is no difference between a verbal admission or giving of evidence which could incriminate a respondent. Further in the Zeigler case, the court set up standards regarding the necessity of the prosecution sustaining its burden approving the voluntariness of a consent to searches and seizures prior to such evidence being admitted in criminal prosecutions. The court in the Zeigler case further stated, "that where the accused is first advised of his right and is informed that he need not submit to a search and that if he does the fruits thereof will be used in evidence against him, and if he consents to the search and seizure the Defendant's act, voluntarily and not under coercion and he waives his constitutional right to be secure against reasonable searches and seizures." In this case, there is no evidence that the Defendant, Trudeau, was ever advised of his constitutional rights to be secure against unreasonable searches and seizures and that the Defendant taking all the surrounding facts and circumstances into consideration, the number of police officers, the fact that he was incarcerated in jail and the fact that the Defendant was wisked away from the rest of the prisoners and placed by himself in a room with only three other police officers present combine to eloquently attest to the involuntariness of the Defendant's act which was secured under coercion and resulted in the obtaining by the police department of evidence against the Defendant's permission and such an act does not amount to a waiver of the Defendant's constitutional rights to be secure from the unreasonable searches and seizures.

People vs Zeigler 358 Michigan 355: *Amos vs United States* 255 United States 313.

III. The Police Department Did Not Obtain A Search Warrant Before Obtaining Evidence From the Defendant.

Detective Fasbinder testified in the preliminary examination that he went to the Recorder's Court in Detroit to observe a pair of shoes worn by the Defendant. Further, after the Defendant was asked to raise his heel Detective Fasbinder observed the heel of the shoe, Detective Fasbinder then went to the Wayne County prosecusting attorney's office and did not obtain a search warrant. Notwithstanding the aforesaid, Detective Fasbinder then went back to the Wayne County Jail where the evidence to wit, the said shoes, were then obtained from the Defendant against his wishes and against his permission and was subsequently used against the Defendant. Detective Fasbinder's own statement in the preliminary examination is evident that *if there was probable cause* to believe that this evidence should have been obtained by the people; then certainly when the detective went to the Wayne County prosecutors office *he would have been able to obtain a search warrant.*

IV. Defendant Should Have Been Advised Of His Rights When Suspicion Attached On The Defendant As A Possible Suspect In The Said Case.

On page 57 of the preliminary examination Detective Fasbinder testified as follows:

Question: As soon as you saw his heels, in your statement *did you then have suspicion* that he was involved?

Answer: When I saw the heel, or the pattern was similar to the print on the statement, *I then felt that he could be involved, yes.*

On page 58,

Question: Now, detective, after you saw the respondent it was requested to raise his heel and you observed his heel and then you went to the prosecutor and then you went to the Detroit Police Department and then you went back to attempt to get these shoes, correct?

Answer: I went to the Detroit Police Department, then I went to the Prosecutor and I was to the county jail where I did obtain the shoes.

On page 59,

Question: Well, detective, you didn't have any suspicion that this respondent had anything to do with this crime? Then, why did you go to the police department and the prosecutor's office and go back to get the shoes?

Answer: In my investigation, *I felt this man was involved in the crime.*

Question: When did you feel he was involved in this crime?

Answer: After I had seen the imprint on his heel and in the investigation.

On page 60,

Question: In other words, you didn't advise the respondent to get a lawyer from November 27, to January 2. Is that correct?

Answer: To the best of my knowledge. *No, I didn't advise him to get an attorney.*

The case of the *People vs Escobedo vs. Illinois* 84 Supreme Court 1758 is exactly in point. The United States Supreme Court says as follows:

> "We hold, therefore, that where, as here, the investigation is *no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect,* the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to the eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned of his absolute constitutional rights to remain silent, the accused has been denied the assistance of counsel in violation of the 6th Amendment to the Constitution as made obligatory upon the state by the 14th Amendment, "*Gideon vs. Wainwright* 372 U.S. 342 and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

V. The Cause Of Death Was Not Determined To Have Resulted From A Blow Or Traumatic Injury To The Victim, Thus The People Did Not Prove The Cause Of Death In This Case.

The pathologist who performed an autopsy on the Victim, Dr. Carl M. Hasegawa testified on page 97,

> Answer: Well, it's not the pneumonia that I am not qualified. I don't—it's the connection of the pneumonia with the trauma. I don't want to testify as an expert.

On page 98,

Question by the Prosecutor: Dr., let me ask you this. Are you able to form an opinion as to whether or not without the wounds which you describe to the head, *with the pneumonia in and of itself caused death?*

Answer: You mean without cerebral hemorrhage?

Question: Without any other injuries?

Answer: Do I need to answer that, Judge?

Answer: Don't forget we are taking an individual that by itself can or cannot.

Answer: *I can't answer that,* but with the extenuating circumstances it could have caused, have caused the death so I'm not answering your question, it's like in other words I positively if I were to give you yes or no I can't answer it.

On page 103, the Dr. further testified,

Question: Do you have an opinion as to whether or not if this man had never been injured?

Answer: In what sense? Injured where?

Question: In the head.

Answer: *No, I couldn't answer that question.*

Question: Do you have an opinion as to if the man, the deceased, Aice Green had not sustained the head injuries that you observed at the time you performed the autopsy, *would he have died as a result of the pneumonia?*

Answer: We are going back to the same question.

Question: That's right.

Answer: Well, *I don't know* what his physical state was before that.

On page 107,

Question: Okay, now Dr., I noticed that you have under #6, hypertensive cardiovascular disease, isn't that a heart condition?

Answer: That's right.

Question: Can that lead to death?

Answer: It depends, this man had it for, I think I presume for a long time.

Question: What did he have, a heart condition?

Answer: He had a large heart.

On page 108 the Dr. further testified that the victim had *hardening of the arteries.*

Question: It *could have also caused death,* though, correct?

Answer: If it specifically affects an area.

Question: This arterial sclerosis, if it's in the brain, it could cause death by being in the brain, too?

Answer: Well, I'm saying that generally you asked me if it's generalized.

When the people were unable to prove cause of death by a traumatic injury, the people then called another doctor who did not perform the autopsy nor did he ever meet the doctor nor did he ever know the victim. The second doctor testified strictly upon the report of Dr. Carl Hasegawa who performed the autopsy and who testified in court that he was unable to definitely ascertain the cause of death. Under the best evidence rule it certainly appears that the doctor who performed the autopsy and was qualified as an expert witness by the prosecutor himself should certainly be the only evidence the court takes into consideration pursuant to the cause of death. Further, it appears that by the prosecution producing another doctor, prosecution is impeaching its own witness.

On page 47 of the preliminary examination held on January 31, 1968.

Question: Dr., directing your attention to #7 arterial sclerosis, that the previous doctor testified was the brain, isn't it possible that a man could die from that?

Answer: It is possible the man could but it is obvious this man didn't.

Question: Dr., if a previous doctor testified that, that was part of the death, would you say he was wrong?

Answer: I certainly would.

Further Dr. Olsen testified that a person could have pneumonia, go about his daily routine, as stated on page 49, and subsequently could die from the same. Further Dr. Olsen testifiefid on page 42 that people usually cough when they have pneumonia. On page 21 of the aforesaid examination, the people's witness, Mr. Merritt, testified that when he drove the victim to work he heard him cough which is consistent with the findings of pneumonia by the pathologist.

VI. The Testimony Of Raymond Smiegel Should Be Stricken From The Records Due To His Credibility, And The Fact That He Admitted Lying —And Delay Of His Sentence.

Raymond Smiegel was the co-defendant with the respondent in Detroit. He has a most extensive criminal record which would go to his creditability. More important, Mr. Smiegel on page 96 of the examination admits he lied.

Question: So then Detective Fasbinder did threaten you?

Answer: No, he didn't.

Question: *Well, then, are you saying today that you lied to Eddy?*

Answer: *Yes.*

If the man admits lying to another person then certainly how can one believe him in this case? Further, most of his testimony is based upon so-called conversation he had with the respondent while they were both incarcerated. Mr. Smiegel was arrested and was to be sentenced together with Mr. Trudeau in Detroit on the same day, to wit: January 4. The respondent was sentenced on January 4 in accordance with the date the judge originally set for the sentencing. However, Mr. Smiegel was not sentenced January 4 as the court originally had set, rather they adjourned Mr. Smiegel's sentencing until January 18. On January 18, Mr. Smiegel was also not sentenced. At the time of the preliminary examination Mr. Smiegel testified that he would be sentenced the day after he testified at the preliminary examination. Upon the defense attempting to ascertain why Mr. Smiegel's sentencing kept on being adjourned, the prosecution objected and would not permit the witness to answer the delays in his sentencing. However, it is consistent that Mr. Smiegel was not to be sentenced until after he testified in this cause.

VII. The People Did Not Move The Admission Of The Peoples Proposed Exhibit #1 And It Was Never Introduced And Received Into Evidence.

Therefore, all testimony pursuant thereto should be stricken since the court did not receive the exhibit into evidence. The prosecution never made a motion for the receipt of proposed exhibit #1 and therefore, any testifying pursuant to the set exhibit is inadmissible and should be stricken.

Wherefore the defense respectfully prays that:

1. This Honorable Court determine the search of the Defendant was illegal and all evidence obtained from the Defendant shall not be allowed in evidence and the same shall be stricken from the record.

2. The cause of death was not traumatic.

3. That the testimony of Raymond Smiegel be stricken.

4. That this Court suppress the evidence used against the Defendant.

5. That since the people failed to prove a crime was committted because of their failure to prove cause of death and since the people failed to show that there was probable cause to believe that the Defendant committed any crime this court should dismiss this cause against the Defendant.

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Date: June 21, 1968